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# GUIDE TO APPLICATIONS FOR EMPLOYMENT OF PROFESSIONALS AND TREATMENT OF RETAINERS ("EMPLOYMENT GUIDE")

## I. APPLICATIONS TO EMPLOY

### A. GENERAL INFORMATION REQUIRED

The bankruptcy court must approve the employment of any attorney, accountant, appraiser, auctioneer, agent or other professional retained pursuant to §327, § 1103 and § 1114 of the Bankruptcy Code. Pursuant to Federal Rule of Bankruptcy Procedure 2014(a) and Local Rules 2014-1 and 2016-1, an application to employ such a professional must include the following information.

1. The name and occupation of the person or firm to be employed.
2. Facts demonstrating the necessity for the employment and the specific services to be rendered.
3. The reason for the selection of the particular professional to be employed, including facts to substantiate that the proposed professional has attained a sufficient experience level to render the proposed services. The professional's personal and, if appropriate, firm resume should be attached. If a trustee proposes to retain his or her own firm as counsel, the application must show a compelling reason why appointment of outside counsel is not feasible.
4. A declaration under penalty of perjury setting forth, to the best of the professional's knowledge, all of the professional's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States Trustee and any person employed by the Office of the United States Trustee, and whether the professional holds any interest adverse to the estate of the debtor. The declaration must contain facts, not merely legal conclusions.
5. The terms and conditions of the employment agreement, including the hourly rate charged by each professional (including partners, associates, and paraprofessional persons employed by the professional) expected to render services to or for the benefit of the estate.
6. If the professional is an attorney, the application must state the amount and source of any fees, retainers or other compensation (including any contingency fee agreements) paid or agreed to be paid, including any fees, retainers or other compensation paid or agreed to be paid within one year of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case, whether the fees, retainers or other compensation has already been

paid, whether the retainer is an advance against fees for services to be rendered or earned upon receipt, whether all or any portion of the retainer is refundable, the services, if any, the client is entitled to receive in exchange for the retainer, the facts justifying the amount of the retainer, and a declaration under penalty of perjury demonstrating the need for a retainer, including any unusual circumstances that would justify a post-petition retainer.

7. If the application is made more than thirty days after the date post-petition services commenced, it must include a declaration under penalty of perjury explaining the delay and stating the amount of fees and expenses that have accrued during the period between the date post-petition services were commenced and the date of the application.
8. If the application is made more than sixty days after the date post-petition services commenced, the Notice of Application required by Bankruptcy Local Rule 2014-1 (see item I.B.4 below) must include a statement that retroactive employment is being requested and the date that services commenced. Normally only extraordinary facts will justify retroactive employment.
9. If more than one of a particular type of professional is being retained, each application must set forth the need for dual professionals, the services to be performed by each, a statement that there will be no duplication of services and an explanation of how duplication will be avoided.

## **B. FORM OF APPLICATION AND PROCEDURES FOR SUBMISSION**

The application must be signed by a person authorized to make the application, such as the debtor in possession, the chapter 11 trustee, creditors' committee chairman, or an officer, general partner or other principal of the debtor in possession. It is not acceptable for counsel to sign on behalf of the applicant.

2. The application, together with a proposed order, must be submitted to the United States Trustee for review and comment prior to filing unless noticed and set for hearing pursuant to Local Bankruptcy Rule 2014-1, or otherwise ordered by the court. Applications will be processed by the United States Trustee in the regular course of business unless there is a demonstrated emergency. In an emergency case, counsel should telephone the attorney for the United States Trustee assigned to the case to arrange for expedited treatment.
3. The application must include a separate page for the comments of the United States Trustee (the format to be used for the comment page is attached to the "Notice of Requirements for Chapter 11 Debtors"). This comment page should be placed at the end of the application if the proposed order is a separate document, or just before a proposed order included in the same document.
4. Notice that the application has been submitted to the United States Trustee must be filed and served on the appropriate parties as specified in Local Rule 2014-1, prior to or on the same day that the application is submitted. A copy of this notice must be attached as an exhibit to the application to employ. Under local procedures established by the court in Santa Ana and applicable only in Santa Ana, the applicant must submit, with the application to employ, a separately blue-backed notice stating that notice of the application was served and no opposition was received by the applicant within fifteen days after service of the notice. Because this requirement inevitably delays the submission of the application to the United States Trustee, for purposes of the time periods discussed in paragraphs A.8 and A.9 above, the application will be considered as submitted on the date that the notice of application is served.

5. In addition to the information required to be included in the Notice of Application in Local Rule 2014-1, the Notice should include any terms, including "evergreen" provisions, that allow for payments or transfers of funds to the professional without any further notice or hearing.

## **II. RETAINERS**

### **A. GENERAL INFORMATION**

Any unearned portion of a pre-petition or post-petition retainer that is an advance against fees must be deposited in a segregated trust account upon filing of the petition. If the pre-petition retainer is earned upon receipt, the funds need not be segregated by the professional.

### **B. ACCOUNTING FOR SERVICES COVERED BY A RETAINER**

Any professional who has received a pre-petition or post-petition retainer must submit to the United States Trustee a monthly Professional Fee Statement (Form USTLA-6) no later than the 20th day after the end of the month during which professional services were rendered, together with documentation supporting the charges for the professional services and expenses in the form required for professional fee applications in the "United States Trustee Guide to Applications for Professional Compensation." In addition, a copy of the Professional Fee Statement (without the supporting documentation) must be served on the official creditors' committee or, if no committee has been appointed, on the 20 largest unsecured creditors, and on those parties who have requested special notice. The Professional Fee Statement should include a statement that the supporting documentation can be obtained from the professional upon request.

2. The Professional Fee Statement must explicitly state that the fees and costs will be withdrawn from the trust account in the amount requested without further notice or hearing, unless an objection is filed with the clerk of the court and served upon the applicant(s) within 10 days after service of the Professional Fee Statement. If no objection is timely filed and served, the professional may withdraw the requested compensation without further notice, hearing or order. If an objection is timely filed and served, the professional should refrain from withdrawing any funds until the objection has been resolved by the court.
3. Notwithstanding the submission of the Professional Fee Statement, as long as the professional is performing services covered by a retainer, the professional must submit interim fee applications to the court every 120 days in the form and manner specified in the "Guide to Applications for Professional Compensation." Once the full amount of the retainer including an earned on receipt retainer, has been accounted for, no further Professional Fee Statements shall be filed.
4. Neither the United States Trustee nor any party in interest shall be estopped from raising objections to any charge or expense in any professional fee application filed with the court on the ground that no objection was lodged to the Professional Fee Statement.

Special Note: Some judges do not permit attorneys to draw down on retainers pursuant to the above procedures. Attorneys with retainers should thus make certain at the time of their employment what procedures are required by the judge to whom the case is assigned.